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CURRENT TOPICS

Vice-Presidency of The Law Society

THE election of Mr. FREDERIC HUBERT JESSOP to be Vice-President of The Law Society for 1953–54 formally resolves a situation distasteful alike to members and protagonists and, it may be hoped, clears the path for united effort by the profession in the months ahead. In the postal ballot held after the adjournment of the annual general meeting on 3rd July, the result of the voting, declared at the resumed meeting on 23rd July, was: Mr. Jessop, 5,924; Mr. Walter Charles Norton, 4,484. By a clear majority, therefore, members have made their choice, and it now behoves the profession to put dissension behind it and demonstrate that loyalty to democratic traditions which is rightly expected of those whose lives are spent in upholding the rule of law.

Assurances of Land for Educational Purposes

THE attention of conveyancers is drawn to the provisions of s. 15 of the Education (Miscellaneous Provisions) Act, 1953, which received the Royal Assent on 14th July. Under s. 87 (2) of the Education Act, 1944, an assurance of land or of personal estate to be laid out in the purchase of land for educational purposes is void unless a copy is sent to the Minister within six months from the date on which the assurance takes effect. Section 15 (1) of the 1953 Act now provides that s. 87 (2) shall not apply to an assurance of land or personal estate to a local education authority, a university, a university college, or a college of a university, if it takes effect after 14th July, 1953. This relaxation however, does not have the effect of requiring the assurance to be sent to the Charity Commissioners under s. 29 (4) of the Settled Land Act, 1925 (see s. 15 (3) of the 1953 Act). It may also be useful in this context to mention s. 14 of the 1953 Act, which empowers the Minister, on application by trustees holding premises used for a voluntary school, to modify the trust instrument so as to secure that, so long as the school is maintained by a local education authority, the use of the premises shall not be diverted to other purposes otherwise permitted by the trusts.

Civil Claims against Members of the United States Air Force

THE Lord Chancellor's Office states that, as some doubts have been expressed as to the correct procedure to be followed by persons having claims in contract or tort against members of the United States Air Force in this country, the following notes are issued for guidance with the approval of the appropriate United States authorities: Instructions have been issued by the U.S. authorities to the commanding officers of all their units in this country that every facility is to be given for the service of process on members of the U.S. Air Force. The proper course to be followed by a creditor or other person having a claim against a member of the U.S. Air Force is for him to communicate with the commanding officer or, where the unit concerned has a legal officer, with the

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legal officer of the defendant's unit requesting him to provide facilities for the service of process on the defendant. It is not possible for the U.S. authorities to act as arbitrators when a civil claim in contract or tort is made against a member of their forces. It is, therefore, essential that the claim should either be admitted by the defendant or should be reduced to judgment, whether in the High Court or a county court. If a claim has been admitted or judgment has been obtained and the claimant has failed to obtain satisfaction within a reasonable period, his proper course is then to write to: The Staff Judge Advocate, Headquarters, Third Air Force, Victoria Park Estates, South Ruislip, Middlesex, enclosing a copy of the defendant's written admission of the claim or, as the case may be, a copy of the judgment. Steps will thereupon be taken by the Staff Judge Advocate to ensure that the matter is brought to the defendant's attention with a view to prompt satisfaction of the claim.

Counsel's Fees

THE immediate effect of the proposals in the Evershed Committee's report to cut down barristers' fees when the incomes of the rest of the population are rising has been not only "serious disquiet" at the junior Bar, to quote *The Times* Legal Correspondent, but also some derision. It is pointed out that the proposal that an amount towards the fees of the barrister's clerk should no longer be paid by the client would operate unfairly against the young barrister who depends on small fees. It is of interest that the only member of the Committee who belonged to the junior Bar took silk in 1948, in the course of the Committee's deliberations, and another senior member of the junior Bar was invited to and attended meetings. It is doubtful whether the proposed review and adjustment of fees, even by the Bar in conjunction with The Law Society, does more by way of compensation for immediate loss than to offer a vague promise. As "Junior Counsel," writing in *The Times* of 18th July, said, "fine words butter no parsnips." "The problem," he wrote, "of how to exact higher fees in a buyers' market where supply exceeds demand from solicitors, whose duty to their clients it is to pay no more than they need, has exercised a committee of the Bar Council for the last four years. No successful solution has been found beyond the inadequate step of raising the minimum fee to two guineas. The Law Society quite reasonably has shown no disposition to co-operate in the raising of fees." On the question of the "two-thirds" rule, another correspondent suggests (in *The Times* of 20th July) that the Committee's recommendation would defeat itself, since by reducing the net cost to the litigant it would force the "fashionable" leader to increase his fees in self-protection. "The litigant," he remarks, "pays the same, for the same service; the leader appears to gain, though perhaps the only party truly benefited is the Inland Revenue. It is only the junior who has all to lose."

Income Tax Act, 1952, s. 22: Form 8–2

AN accountant's advice on the prescribed form No. 8–2, issued under s. 22 of the Income Tax Act, 1952, to a person in receipt of profits or gains belonging to another chargeable person, is contained in an article by Mr. J. C. PEIRSON, F.C.A., in the issue of the *Accountant* for 18th July, 1953. The scope of the form, as he indicated, extends to income as widely divergent as bank interest, copyright royalties and even trading profits, and a solicitor, Mr. Peirson said, can ease himself of the burden of examining the nature of every credit entry in his clients' ledger by asking himself: "Is it income which the Revenue expects us to return?" This, he admitted, may not be an easy question to answer, but generally speaking the solicitor may confine himself to the specified headings. Among many items of information and advice, the writer stated that each partner must consider his personal trusteeships. The writer also referred to counsel's opinion taken by The Law Society to the effect that any privilege which solicitors might otherwise claim for information about their clients has been overridden by the statute. "It must seem strange," he concluded, "that when banks were forced to give very limited information, there was a considerable public outcry; whereas little has yet been said about solicitors whose business is far more confidential and from whom a far greater variety of information is exacted . . . the fault lies with the law as it stands, rather than its application by the Revenue."

How Nationalisation Pays

A QUESTION which at first sight appears to bear a political complexion is answered by the writer of a letter to the *Daily Telegraph* in such an unexceptionable manner that we feel that its complimentary references to solicitors should be mentioned in these columns. On two occasions, Mr. F. J. BAILEY, the writer of the letter, tried to obtain compensation from the Post Office and from British Railways respectively, and on each occasion he only succeeded after employing a solicitor. On the first occasion, the Post Office paid the solicitor one guinea for his costs in settling a modest claim for damage to a motor car owing to telephone wires being strewn across the road. In the second case, British Railways paid the solicitor two guineas on settling a claim for damages arising from the failure of a railway time-table to show that a train would be "split" at Newbury. It is fair to add that the damages in the second case were £2. "Nationalisation—It Does Pay—Solicitors" was the *Daily Telegraph* headline, and Mr. Bailey said in conclusion: "I am thus able to offer an emphatic affirmative to the query, 'Do the nationalised industries pay?'" Whether the solicitors concerned would be so emphatic may be doubted. When the cost of the service that they render is set off against their remuneration, their only consolation may well be that the virtue of service is its own reward.

Housing Subsidies

EXCHEQUER subsidies and rate contributions for new houses built by local authorities in England and Wales are to remain unchanged. The present rates were fixed by the Housing Act, 1952, which amended the Housing (Financial and Miscellaneous Provisions) Act, 1946, and they will now continue to be payable in respect of new houses built before 30th June, 1954. This statement was made in a White Paper published on 7th July, 1953 (Housing (Financial and Miscellaneous Provisions) Act, 1946; Report under s. 16 (5) (England and Wales)). After considering the tender prices submitted to him by local authorities for approval since December, 1951, and other relevant factors, including the fact that existing rates have been payable only since February, 1952, the Minister has decided that he would not at the present time be justified in making an order reducing the level of contributions. The principal subsidies are: *General Standard Subsidy:* Exchequer, £26 14s. per house per year for 60 years; local authority contribution, £8 18s. per house per year for 60 years. *Special Subsidy for Houses for Agricultural Workers:* Exchequer, £35 14s. per year for 60 years; rates £5 per year (£2 10s. from the local authority and £2 10s. from the county council) for 60 years.

Company Law and Practice

THE AUTHORITY OF THE MODERN COMPANY SECRETARY

THE recent decision of Roxburgh, J., in *Re Jon Beauforte (London), Ltd.* [1953] 2 W.L.R. 465; *ante*, p. 152, serves to underline a point that is not always readily to mind, namely, that in dealings with limited companies appearances may be very deceptive. It is no exaggeration to say that in the business community thousands of everyday transactions take place where limited companies are involved and, in the vast majority of these transactions, it never enters the other party's head to inquire whether or not the company has power to enter into the transaction. Even if the company has power, the further inquiry as to whether or not the person entering into the transaction on behalf of the company has authority to do so is seldom made.

One matter in which the courts have, in the past, appeared to be rather reluctant to recognise established commercial practice is in the authority that, in the absence of express and detailed provisions in the articles, will be accorded to the secretary of a company. The purpose of the present article is to examine the authority of the modern company secretary with regard to transactions with third parties and, in particular, to consider how far an outsider may safely rely on a contract made, or a document signed, by the secretary.

"A Mere Servant"

When one first turns to the cases the picture presented is a depressing one. Many expressions of judicial opinion are to be found as to what a secretary may not do. As Lord Esher said in *Barnett* v. *South London Tramways Co.* (1887), 18 Q.B.D. 815, at p. 817, he is "a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." As recently as 1938, in *Re Cleadon Trust, Ltd.* [1938] 4 All E.R. 518, Scott, L.J. (at p. 532), referred to the secretary of the three companies involved in the following terms: "The three companies all had the same office and Mr. Antrobus was secretary of all three. There was no evidence of his being given any managerial powers. He remained a mere secretary so far as his authority and duties were concerned."

The earlier cases seem even more unpromising. There is a suggestion in *Webb* v. *Harries* (1848), 12 L.T. (o.s.) 275, that his authority does not even extend to the employment of a clerk and, in *Bruff* v. *Great Northern Railway Co.* (1858), 1 F. & F. 344, it was held that he had no authority to admit, on behalf of his company, the receipt of a letter.

In *Newlands* v. *National Employers' Accident Association, Ltd.* (1885), 54 L.J.Q.B. 428, it was held that a contract made with a company in reliance on representations made by the secretary will not be rescinded for fraud. He has no authority to make representations to induce the purchase of shares in the company. *Barnett* v. *South London Tramways Co.*, *supra*, followed some two years later. In that case Barnett took an assignment from a contractor of some retention moneys the contractor said were due to him. Barnett took the precaution of inquiring from the company, and received confirmation from the secretary that the moneys were, in fact, payable to the contractor. But in actual fact this was not so. When Barnett sued the tramway company as assignee of the retention moneys it was held that the company were not estopped from denying the statement made by their secretary. There was no evidence that he had authority to represent anything and so no estoppel arose. Finally, mention may be made of *Ruben* v. *Great Fingall Consolidated* [1906] A.C. 439, where the secretary was party to the issue of certain forged share certificates. It was held that the company was not liable for his fraud; it had never held out the secretary as having authority to do more than the mere ministerial act of delivering certificates.

Ostensible and Implied Authority

In the foregoing cases the principal difficulty in the way of the plaintiff was that he was unable to prove any actual or ostensible authority on the part of the secretary to make the representation, or to do the act, that was in fact made or done.

Now it is easy to answer complaints at the stringency of the decisions on the humble nature of the secretary's office by saying that each case is really one of fact and depends largely on the particular memorandum and articles of the company concerned. This may be so, but some of the decisions come very near to laying down, as a matter of law, that the secretary has no authority to do anything unless express authority can be found in the memorandum or articles or in a statute empowering him to do certain acts. If we add to this the decision of Slade, J., in *Rama Corporation* v. *Proved Tin & General Investments, Ltd.* [1952] 2 Q.B. 147, that a person who, at the time of entering into a contract with a registered company, has no knowledge of the company's articles of association, cannot later rely on those articles as conferring ostensible or apparent authority on the agent of the company with whom he deals, it will be seen that there are some uncertainties attached to entering into a contract with a company through its secretary, or relying on any representation made by him.

A company will be liable to a third party induced to enter into a contract with it by a person whom the company has allowed to hold himself out as its agent. Such person has ostensible or apparent authority to contract on behalf of the company. Whether or not there was ostensible authority is a question of fact, the onus lying on the person who asserts it. If however, the third party has contracted with the secretary, as secretary, it would seem, from the cases cited earlier in this article, that he thereby has notice that the secretary is exceeding his authority, unless he has examined the articles before entering into the contract, and the articles have provided for the delegation of managerial powers to the secretary.

Questions of implied authority will arise when there is, in fact, actual authority, and it is sought to determine the limits of the actual authority. Implied authority will cover subordinate acts of an agent which are necessary, or incidental, to his actual authority, but not acts outside the ordinary scope of his functions, and the functions of a secretary ("mere" seems the favourite adjective) have been narrowly defined by the courts.

For there to be implied authority, there must necessarily be some actual authority to act as agent; but there is no actual authority when the company, having held out a person as its agent, is later estopped from denying his ostensible or apparent authority: "Ostensible or apparent authority, which negatives the existence of actual authority, is merely a form of estoppel and has been termed agency by estoppel, and a party

cannot call in aid an estoppel unless three ingredients are present: (i) a representation, (ii) a reliance on a representation, and (iii) an alteration of his position resulting from such reliance" (*per* Slade, J., in *Rama Corporation* v. *Proved Tin and General Investments, Ltd.* [1952] 1 All E.R., at p. 556).

It would seem that, before there can be a representation by a company that a secretary has power to act as agent on its behalf, there must be a power to appoint the secretary so to act. If the power is there then the person dealing with the secretary as agent is not concerned with internal matters affecting the validity of his appointment. As Lord Greene, M.R., said in *Uxbridge Permanent Benefit Building Society* v. *Pickard* [1939] 2 All E.R. 344, at p. 350: "In the case of a limited company, the actual authority of an agent is of necessity subscribed by the constituent documents under which the company has its existence and from which it derives its power, which a person dealing with the company is assumed to know. The internal management and everyday internal administration of the company are things which an outsider cannot be expected to know from the light of nature, or by inspecting some file, as he can with public documents, like memoranda or articles of association."

It appears that, although the outsider may rely on the ostensible authority of the agent if he knows that there is power to appoint such an agent, yet if he does not know of the power to appoint, no amount of holding out of the agent will assist him, because he cannot rely on a representation (in the form of a power to appoint agents) unless he knows of its existence (*Rama Corporation* v. *Proved Tin & General Investments, Ltd., supra*).

Table A

Applying the above principles to a company the articles of which substantially follow Table A to the First Schedule to the Companies Act, 1948, it is seen that there is little to encourage a person to deal with the secretary of the company as its agent.

Article 80 provides that the business of the company is to be managed by the directors. Article 84 (3) permits a director to hold any other office or place of profit under the company. A director may, therefore, also be secretary. Article 85 requires all bills and cheques to be executed as the directors shall from time to time determine. A secretary might, therefore, have actual, or be held out as having ostensible, authority to execute bills and cheques. Article 102 gives the directors power to delegate any of their powers to a committee consisting of such member or members of their body as they think fit. Article 107 is a power to appoint a managing director and art. 109 is the authority for directors to delegate their powers to a managing director.

Article 110 provides for the appointment of a secretary, but makes no mention of his powers, although art. 113 authorises him to counter-sign, with a director, documents under seal. Finally, art. 136 includes the secretary among those entitled to benefit from the limited indemnity conferred thereby.

It will thus be seen that there is nothing in Table A to confer on a secretary anything in the nature of managerial functions. These are wholly reserved to the directors.

Two possibilities may, however, be mentioned. Either the company may adopt a special article conferring on the secretary such powers as the directors may from time to time determine, or the secretary may also be a director. The first possibility will go a long way towards solving the present problem; the second is outside the scope of the present article, because the authority then exercised might well be that of director rather than secretary.

The Companies Act, 1948

The next inquiry is whether there is anything in the Companies Act, 1948, to enlarge the scope of the secretary's authority.

The definition section (s. 455) enacts that, in relation to a body corporate, the term "officer" includes a director, manager, or secretary. Section 200 requires the company to keep a register of directors and secretaries. It is interesting to contrast this section with s. 144 of the Companies Act, 1929, which required the maintenance of a register of directors and managers; the 1948 Act substitutes secretaries for managers. Section 177 (1) for the first time requires a company to have a secretary, who may not also be the sole director of the company.

Section 36 enacts that a document or proceeding requiring authentication by a company may be signed by a director, secretary or other officer of the company and need not be under its common seal; but this section appears merely to dispense with the need for the seal as a means of authenticating documents; it does not confer on the officer concerned any greater powers than he may be given under the articles.

There is no mention of the secretary in s. 180, which provides that the acts of a director or manager are to be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Many duties are assigned to the secretary by the Act, but they are all ministerial rather than managerial. The secretary is required to sign the annual return (s. 126 (1)). He is required to verify by affidavit the statement of affairs submitted to the official receiver on a winding up by the court (s. 235 (2)) or to a receiver or manager on his appointment on behalf of debenture-holders secured by a floating charge (s. 373 (1)). He is permitted to do many acts; for example, if named as secretary in the articles he may make the statutory declaration to accompany the documents on registration (s. 15 (2)) or he may make the statutory declaration to obtain the trading certificate (s. 109 (1)).

It is, however, submitted that there is nothing in the Companies Act, 1948 (or in Table A of that Act where adopted by a company as its articles), to indicate any greater extension of managerial authority to a secretary than follows from the cases discussed earlier.

Commercial Practice

Although the conclusion as to the limits of the secretary's authority reached above may be correct in theory, it cannot be denied that modern commercial practice does give to the secretary of a company a position of standing and authority. In a large company he is one of the principal officers, often ranking next below the general manager. In a small company he may be the only officer apart from a director or managing director. The question that will one day have to be faced by the courts is whether, in the absence of imperative legislation, they are prepared to recognise the implications of this development.

Although art. 86 of Table A requires minutes to be kept of all appointments of officers made by the directors, there is no article in Table A to define the powers of such officers. Consequently if an officer is appointed, the scope of his authority must be determined by normal commercial practice. Thus a manager has implied authority to do all acts necessary for the proper conduct of the business, although this will be limited to the ordinary commercial business of the company (*Cartmell's Case* (1874), L.R. 9 Ch. 691).

Is it not now possible to argue that a secretary in modern commercial practice occupies a position very close to that of a

manager? The internal duties may be split between departments, but the status of the two appointments is close. Obviously the question could be simply resolved by appointing a secretary to be a deputy or assistant manager; but the present submission is that an appointment as secretary *simpliciter* should now be recognised as conferring executive authority on the appointee.

It is not much help to the business man to be told that it is a question of fact and degree in every case. In earlier decisions the courts were forthright enough in laying down as a matter of law that the secretary was a person of very limited authority. Can it not now be held, as a matter of law, that modern commercial usage accords to the company secretary a position of executive responsibility? H. N. B.

A Conveyancer's Diary

CONTROLLED PRICES OF HOUSES

FROM the conveyancer's point of view, there is very little that I can add to what I said on this subject some fifteen months ago (see 96 SOL. J. 223). But the decision of a Divisional Court of the Queen's Bench Division in *R.* v. *Wimbledon Justices; ex parte Derwent* [1953] 1 Q.B. 380 affords me the opportunity of underlining the principal point made in my earlier article on this legislation, and further experience of the problems which confront solicitors acting for parties in transactions which fall within this legislation, as distinct from the problems which affect the parties themselves, may make it possible for me to add something of use and interest to the practitioner.

Section 7 (1) of the Building Materials and Housing Act, 1945 (which as amended and extended by the Housing Act, 1949, is still in force, although its future after 19th December next is problematic), makes it an offence to sell or offer to sell a house (which includes a flat), which has been or is being constructed or converted under the authority of a building licence, for a greater price than the price limited by the licence ("the permitted price"). This subsection also makes it an offence to let or offer to let a house, which has been or is being constructed or converted under the authority of a building licence, at a rent in excess of the rent limited by the licence ("the permitted rent"). Any person committing an offence under this subsection is liable, on summary conviction, to a fine which is not to exceed the aggregate of (*a*) such amount as will in the opinion of the court secure that that person derives no benefit from the offence, and (*b*) the further amount of £100, or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment. (I have not heard of any case in which an offender under this section has been sentenced to a term of imprisonment. Presumably, offences under the section are rare enough, in relation to the number of licences granted with a limitation of price or rent, to make it unnecessary to resort to this penalty.)

There follow upon this subsection a number of others providing for such matters as the notional computations in terms of money of a consideration which consists either wholly or partly of something other than a money payment, transactions associated with the sale or letting, and apportionment where the sale or letting is effected together with a sale or letting of other property. Then, by subs. (7), it is provided that, where any fine imposed includes any amount intended to secure that the offender is to derive no benefit from his offence, the court may direct the whole or any part of such amount to be paid (in effect) to the purchaser or lessee, and, further, that the court may, in certain cases, make any modifications in the terms and conditions of any letting or sale which may be necessary to secure that the rent or price does not exceed the permitted rent or price, as the case may be. Subject to these provisions, the commission of an offence under the section "shall not affect the title to any property or the operation of any contract" (s. 7 (8)). And, finally, under s. 8 (1) a builder's licence containing a limitation of price or rent is made registrable as a land charge by the local authority in the area in which the house is situated, and under s. 8 (2) the duty of enforcing these provisions generally is specifically placed on the local authority.

In *R.* v. *Wimbledon Justices*, on the 12th June, 1952, an information was preferred against the applicant in which it was alleged that on the 27th April, 1950, he had let a certain house at a rent in excess of the permitted rent. At the hearing before the justices, a preliminary objection was taken on behalf of the applicant that the justices had no jurisdiction to hear the charge, since the information had not been laid within six months from the time when the matter of the information (i.e., the letting of the house on the 27th April, 1950) arose, as required by s. 11 of the Summary Jurisdiction Act, 1848. The prosecution thereupon applied to amend the information, so that as amended it alleged that the applicant on the 27th April, 1950, did "unlawfully let a house . . . for a term of seven years from 25th March, 1950, at a rent of £245 per annum exclusive of rates, notwithstanding that it was a condition of the building licence . . . under which the said house was erected that the said house should not be let at a rental in excess of £220 per annum exclusive of rates, *and that the said house continued to be and is still let at the said rent which is in excess of the rent so limited*, contrary to s. 7" of the Act of 1945. (The words in italics were the words introduced by the amendment of the information.) The justices allowed this amendment and held that they had jurisdiction to hear the information, as amended, but adjourned the hearing in order to give the applicant an opportunity to apply for an order of prohibition to prohibit them from continuing to hear the information. The basis of this application was that the offence created by s. 7 (1) of the Act was complete at the date of the granting of the lease of which complaint was made, and was not a continuing offence during the currency of the lease.

The Divisional Court (Lord Goddard, C.J., Croom-Johnson and Pearson, JJ.) made the order as asked for. There was no division of opinion between the three members of the court on the principal question, which was dealt with by Lord Goddard in his judgment as follows. After holding that, in the absence of some specific provision limiting the time in which complaint of an offence under the Act should be made, s. 11 of the Act of 1848 applied, he went on: "The question which we have to decide is whether the proposed amendment discloses an offence under the Act. . . . We are asked to say, as I understand it, that the words 'lets or offers to let' are to be construed as meaning that an offence is committed during the whole time of the lease. In my opinion, such a construction is impossible. A person lets a house once and for all when he demises it by means of a lease. It is conceded that, if the case is one of a sale, the offence takes place once and for all when the house is sold—that is, when the conveyance is executed or even when the

house is offered for sale. How can we give a different construction to the words 'sells or offers to sell' from that to be given to 'lets or offers to let'? It would be quite impossible. . . ."

It is clear from this decision that in the case of a sale of a house the latest date on which an offence under s. 7 of the Act can be committed is the date on which the conveyance is executed. (It would doubtless be arguable that the expression "sell" in this context should be given its technical meaning of entering into a contract of sale and that the date of the contract is, therefore, the latest date for this purpose; but that is another matter.) If, therefore, a purchaser attempts to re-open a transaction on the ground that the vendor has committed a breach of s. 7, the first thing to ascertain is the date of the alleged offence. If that date is more than six months past, it is generally useless to attempt to re-open the transaction with the vendor or his solicitors. Indeed, it may be improper to do so, for a request to re-open a sale on the ground that there has been an infringement of s. 7 is tantamount to a request for a return of part of the purchase price, and to make such a request when there is no title to support it may leave the motives of the person making it open to misconstruction. Of course, a request for some sort of *ex gratia* repayment in a suitable case—where the consideration has been arrived at in error, either on the part of the purchaser alone or on the part of both parties—is quite another thing; but an approach on these lines is seldom likely to be very fruitful.

The real protection which this legislation affords to a purchaser lies in the provision that a licence limiting the price at which a house should be sold is to be registered as a local land charge by the local authority. This provision makes the position of any solicitor acting for a purchaser of a house for which a permitted price has been fixed a relatively easy one, so far as this legislation is concerned. Accidents apart, the existence of a permitted price comes to light at an early stage of the transaction, and if the contract price exceeds the permitted price the purchaser can be informed before any considerable expense has been incurred. This matter of expense is important because the purchaser cannot, either at this or at any other stage of the transaction, force the vendor to reduce the contract price to the permitted price. All he can do is to inform the local authority of the transaction and leave it to the authority to decide whether to prosecute the vendor under s. 7 (1) or not, and meanwhile the contract remains a binding contract of sale.

Local authorities, by the nature of their composition and the manner in which they perform their duties, are not very quick to move in matters like this, and while the authority is considering the matter the purchaser may find himself in difficulties. It is at this stage that his solicitor may receive a request to open negotiations with the vendor for a rescission of the contract, and there seems to me to be nothing improper in acceding to a request of this kind and attempting to reach agreement by negotiation. The purchaser in such a case has committed no offence, and his advisers cannot be in any worse position than he himself. And the position of both the purchaser and his advisers must logically be the same if an attempt is made to rescind the contract without notifying the local authority of the alleged offence on the vendor's part. On the other hand, if the purchaser, when he is informed that the contract price is in excess of the registered permitted price, decides to go on with the purchase, as he may reasonably do if the excess is small or he is otherwise particularly anxious to complete, it would be advisable for his solicitor to withdraw from the transaction. For although a purchaser of a house at a price in excess of the permitted price commits no offence under the Act, and *a fortiori* his advisers can commit none, there is a flavour of illegality about the transaction which makes it better for the professional man to withdraw while he can.

The position of the solicitor acting for a vendor who commits an offence under s. 7 (1) by entering into a contract to sell a house at a price in excess of the permitted price is, of course, much clearer. In such a case, an offence is committed before the vendor's solicitor, normally at least, becomes aware of the restriction on the price, and the first notice that he receives of the restriction will be from the purchaser or the purchaser's solicitor. To continue to act for the vendor in such a case is probably to abet the commission of an offence by the vendor, and that, of course, professional considerations apart, is out of the question. The only difficulty which may face the vendor's solicitor in such a case is whether to withdraw at once or to seek to persuade the vendor (if the purchaser is willing) to agree to a modification of the contract by the substitution of the permitted price for the original contract price and to continue on that footing. The latter may appear at first sight to be a relatively harmless alternative, but except in cases where there has been some sort of mistake (and the ancillary provisions in subss. (3) to (6) of s. 7 do afford opportunities for such mistake on the part of vendors) safety lies in complete withdrawal. The matter is not dead with completion, for the purchaser has six months from the contract (at least) in which to take up the matter with the local authority, and although a vendor who has originally asked a price in excess of the permitted price, but has afterwards completed at the permitted price, is not likely to be very heavily punished, if he is prosecuted at all, for his offence, an offence has been committed, and in its inception at any rate the offence in such a case is not a merely technical one. That should be enough to dissuade the vendor's advisers from having anything further to do with it.

"A B C"

Landlord and Tenant Notebook

ENFORCEMENT OF TOWN PLANNING RESTRICTIONS—II

In my first article dealing with this subject, I mooted the question of the position of parties to a lease found to contravene town and country planning restrictions—a question left unsolved by the Court of Appeal in *Burgess* v. *Jarvis and Sevenoaks R.D. Council* [1952] 2 Q.B. 41; 96 Sol. J. 194 (C.A.) after, in my respectful submission (admittedly inspired by a more recent decision, *Marela, Ltd.* v. *Machorowski* [1953] 2 W.L.R. 831; *ante*, p. 280 (C.A.)), being unsatisfactorily disposed of at first instance. I then suggested that decisions on the effects of *ultra vires* grants were not in point, and that it would be necessary to resort to the authorities on tenancies granted for illegal purposes.

The trouble with so many of those authorities is that they are limited, or the information given about them in text-books is limited, to showing that provisions contained in such leases will not be enforced by a court of law. One party sues the other for rent or for breach of covenant; the court tells him that it will not lend its aid and dismisses the action

accordingly ; but what happens after that? A further difficulty is that, however much authority the Rent Acts may have produced, the effect on their security of tenure provisions of such an event has not yet been illustrated. So it is with such material as is available that I will try to examine the effect of enforcement notices served on both parties on their rights and duties as parties to a tenancy.

Perhaps the leading case on grants for illegal purposes is *Gas Light & Coke Co.* v. *Turner* (1840), 6 Bing. (N.C.) 324. What may be regarded as an early and tentative piece of town planning legislation (25 Geo. 3, c. 77) had prohibited the boiling of tar in greater quantities than ten gallons at a time within seventy-five feet of any building (subject to exceptions). A twenty-one-year lease granted by the plaintiffs to the defendant in 1833, coupled with a contemporaneous agreement by which he was to buy from them 100,000 gallons of tar a year, undoubtedly revealed a common intention to carry on, upon the premises, activities which would contravene that statute. (There were some courageous suggestions that he need not occupy the premises at all and, if he must do that, need not boil more than ten gallons at a time, but the court hardly took these seriously.) The action was for rent *and* for breach of the agreement to buy tar, and failed because of the illegality ; but what is of present interest is, what happened or may have happened then ? For the pleas set up that both the indenture of lease and the agreement to buy the tar were wholly void, not merely unenforceable.

The action was tried at first instance in the Court of Common Pleas by (*inter alia*) Tindal, C.J. (5 Bing. (N.C.) 666), whose view was that the court would not lend its aid to enforce the performance of a contract, seal or no seal, between parties which appeared to have been entered into by both parties for the express purpose of carrying into effect that which was prohibited by the law of the land. The following passage throws some light on the question now under review : " It was observed in the course of the argument for the plaintiffs that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of rent. That point is not now before us ; but, without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon any breach of condition in the lease, the action for ejectment would, at all events, be free from the objection that the court was lending its aid to enforce a contract in violation of law." A distinct hint that, the lease presumably containing the usual proviso for re-entry, the defendant would have to go if he did not pay rent, though such rent could not be recovered by legal process. The Court of Exchequer Chamber adopted a similar attitude and also refused to consider consequences, but Abinger, C.B., did refer to the lease as " void." In *Ritchie* v. *Smith* (1848), 6 C.B. 462, an action of assumpsit for the rent of a tap-room failed, it being established that the object was to enable the tenant to sell exciseable liquors without the necessary licence. Wilde, C.J., observed : " I cannot conceive a party to be more conducive to the commission of an offence than by furnishing the place in which it is to be committed " (which place, incidentally, was within a stone's throw of the Houses of Parliament). But here the tenancy was a weekly one, and there were no Rent Acts. In this case, too, the agreement was judicially called " void."

Feret v. *Hill* (1854), 15 C.B. 207, is of some importance as showing the difference between enforcing a contract and enforcing proprietary rights. There was no common intention to break the law ; what happened was that a tenant, having obtained premises by telling the landlord that he wanted to use them for a respectable business, converted them into a brothel ; the landlord ejected him forcibly, but he was held to be entitled to possession. " When the instrument was executed, and possession was given under it, it received its full effect : no aid of a court of justice was required to enforce it," said Maule, J. " The action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the court to afford him a remedy against one who has extruded him from lawful possession. In . . . *Ritchie* v. *Smith* . . . both plaintiff and defendant were parties to an agreement, the very object and intention of which was, to enable one of them to commit an infraction of the law," but then : " if the court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, namely, the payment of rent " ; and this suggests that the question of what happens to the lease afterwards is, whether one or both parties mean to break the law, still open.

The facts of *Gibbons* v. *Chambers* (1885), 1 T.L.R. 530, an action characterised by Day, J., as " an unholy proceeding altogether," were certainly unusual : a building agreement provided for the erection of houses in a disused (unconsecrated) cemetery, and in an action for rent the defendant first relied on subsequent illegality brought about by statute. The learned judge, however, decided that the agreement had been illegal from the first, outraging public decency, and dismissed the claim ; but again we learn nothing about the effect on the parties' proprietary rights.

In *Alexander* v. *Rayson* [1936] 1 K.B. 169 (C.A.), while the decision shows that a landlord who intends to use an instrument of demise for an illegal purpose cannot recover rent, and while there was a fairly full discussion of existing authorities and distinctions drawn, we have little guidance on the question of what will happen to a lease when entered into by both parties with the object of contravening the law. The facts were that the defendant took a flat from the plaintiff, who tendered two documents, a lease and an agreement for services, the plaintiff's object being to deceive the rating authority. The court held that the tenant could not be sued for rent, but that if she paid rent she could not get it back ; but the authority does not really answer the question whether, but for a forfeiture clause, a tenant, innocent or guilty of fraud, would be entitled to remain in possession till the end of the term.

Again, in *Edler* v. *Auerbach* [1949] 2 All E.R. 692 a lease was held unenforceable because the landlord, who had falsely told the tenant that the premises could be used for business purposes, had intended that the tenant should, " as his innocent instrument," break the law by infringing Defence Regulation 68CA ; but it was also held that, as a licence might be obtainable, the agreement was not illegal on the face of it, and in the absence of fraud there could be no rescission.

Endeavouring to apply these authorities to the case of a lease found to contravene town planning restrictions, I think we must proceed on the footing that the use of the expression " void " in such cases as *Gas Light & Coke Co.* v. *Turner* and *Ritchie* v. *Smith* must be taken to relate to the enforcement of provisions in the lease or agreement only, and not to disturb the transfer of proprietary rights created by the grant of an estate, which may, however, be defeasible in the event of rent not being paid. Failing such defeasibility, the term continues : there is no provision for bringing it to an end in such circumstances (as there is in the case of demolition under the Housing Act, 1936, s. 160). But the problem which arose in *Burgess* v. *Jarvis and Sevenoaks R.D.*

Council could, I suggest, ultimately have been settled, not by restraining the landlord from demolishing until an order was made authorising him to enter and demolish, but, notice to quit having been given and expired, by the destruction of the dwelling-house by the authority, such destruction terminating the "statutory" tenancy (*Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman* [1948] 1 K.B. 653 (C.A.)).

R. B.

HERE AND THERE

HILAIRE BELLOC

No longer will the new member of Gray's Inn learn with amusement and awe that Hilaire Belloc is the senior student there. Belloc has gone but, in his own phrase, he has in a manner outflanked death; nor can the grave silence his voice. He spoke in so many tongues and so many tones, ranged so freely over the world of men and their works that, while the English language lasts, no age will be so deaf as not to hear his voice. At Oxford he was the contemporary of John Simon and F. E. Smith, and with them dominated the Union. His two fellows went to the Bar and the Parliament that were to bring them titles and honours, and, as became the son of a French advocate, he too saluted the law at least to the extent of joining an Inn of Court. But neither in the law, nor afterwards in politics, could his restless and violent genius settle into the mould of custom. He could never have spent his life speaking to another man's brief. So when he touched the law it was as a satirist, and among the great immortal lawsuits of literature ranks the climax of "Mr. Petre," the appeal to the House of Lords, ever memorable for the opinion pronounced by the lady occupying the Woolsack as Chancellor, Ermyntrude, first (and last) Viscountess Boole. Or those who drink at the Cricketers Inn at Duncton can never forget that it was there (as circumstantially related in The Four Men) that Mr. Justice Honeybubble on a dispute in the bar there "delivered his famous Opinion, his considered Opinion, his Opinion of permanent value, his Opinion which is the glory of the law." H.B. may not have studied his law books, but he knew his law and lawyers to the life. See his judge, "a man, as are many of the law, who preserved a vigorous gait into old age and an expression of alertness in his limbs and his eyes . . . he always dressed with care and the constant exercise of bullying men who could not reply had given him a commanding air." If you have never read that great summing-up, read it at once and then go and listen to the judge's charge in the nearest jury case that may be handy. Had the many-sided Belloc taken to the law, it would have been the sardonic side of him that would have enjoyed it. "The law is not the dull subject some think it, but a very fascinating trade, full of pleasant whims and tricks for throwing an opponent. It is not all a routine of thrusting poor men into prison as is commonly believed." Still, Belloc chose the better part. Forensic oratory leaves behind only an echo in an empty court, but he marches, solid and assured, to a personal immortality.

SUNSHINE AT SWANSEA

THE law hangs constantly suspended between two opposite perils. If it is certain and rigid, it is a straitjacket on the body politic; if it is a loose, floating drapery, you can hardly find your way into it to put it on at all. The anarchist and the artist and the aristocrat tend to prefer the latter. Planners, apostles of the managerial state and the sad-looking foreigners who take up law when they settle in England tend to be code mongers to whom neatness is all, cherishing the fond belief of the pseudo-scientists that sooner or later everything in the world can be taped, all human behaviour and the deepest recesses of the mind. Doubtless they would find it a thing much to be desired that there should be discovered some machinery for ensuring uniformity of sentences in the criminal courts and applying to penal science the economic principle of "fair shares." It would be a delicate task to ration punishment, but at present the situation exhibits an unpredictability equalled only in the world of the football pools. No doubt, if they can teach the mechanical brain to play bridge, they could teach it to sit on the Bench, where, fed by counsel with all the relevant data of the prisoner's current crime and past record, it could in a few tickings and whirrings calculate the Ideally Equitable Sentence with the infallibility of a ticket machine. But for the moment we have to make do with the human element with all its vagaries, and lately it has been giving a fascinating display of its versatility. The Swansea Assizes, directed by Stable, J., have been a very riot of benevolence, with the judge leaving his seat for cosy little chats with the accused. Probation for the girl found guilty of manslaughter in smothering the child she was minding ("If you keep out of mischief you can forget all about it; if you don't, we will be very cross with you"). Absolute discharge for the blackmailer who demanded £200 with menaces from the milkman who had been his wife's lover ("Now, Rees, this was not the way to handle a problem of that kind; it was the wrong approach"). Conditional discharge for the man who tried to murder his wife by splitting her skull with an axe ("Because she came here and said she can face the future with you with absolute tranquillity I am able to take this course. Now don't forget it"). He had better not forget it. In 1941 a man to whom Stable, J., had given a chance came before him again in a matter of weeks; this time it was seven years. In 1939, the year after his appointment, he gave five I.R.A. terrorists twenty years' penal servitude.

OLYMPIAN THUNDERBOLT

BUT if Swansea has been enjoying a sunny interval, the quality of mercy has been taking no particular strain in the Court of Criminal Appeal, particularly for the reprehensible but (one cannot help thinking) somewhat unfortunate Mr. Harold Markwick. In case you may have missed it, here is the outline as reported in the Press. He was a business man and a member of a golf club, a citizen of good reputation and no previous convictions, and he stole 2s. 6d. from the locker-room. The coin was marked and he was discovered. At Lichfield City Sessions the recorder in a crescendo of moral indignation described it as a "mean, wretched and vile crime" and a "shocking breach of trust." (On the point of the use of the English language, one may note that he would hardly have had any epithets left if the next case had been one of a trustee who had robbed a widow of £5,000.) He proceeded to impose a fine of £500—four thousand times the sum taken. The penalty exacted by society was loss of the employment in which Markwick had served the whole thirty-five years of his working life. From the penalty imposed by the Sessions he appealed, when the Lord Chief Justice observed that the sentence was "about as wrong in principle as any sentence could be" and imposed a new sentence of two months' imprisonment, adding that it would have been very much longer but for the time which had elapsed between conviction and the hearing of the appeal. Yes, of course, there was "the aura of suspicion that must have been thrown on the servants and members." Yes, there must have been at least one previous theft in the club for the trap to be laid. Yes, the judges must have a wide discretion. This is certainly a very striking example of its width. By contrast, only the day after, an ex-boxer appealing to the Southend Quarter Sessions against a three months' sentence for stealing £222 12s. 5d. was given a conditional discharge.

RICHARD ROE.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

CANADA (SASKATCHEWAN): BUSINESS TAX: CONSTITUTIONAL VALIDITY

A.-G. for Saskatchewan *v.* Canadian Pacific Railway Co.; A.-G. for Manitoba and Others, Interveners

Viscount Simon, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen

6th July, 1953

This was an appeal, by special leave, from a judgment of the Supreme Court of Canada, dated 20th November, 1950, allowing in part an appeal by the present respondent from a judgment of the Court of Appeal for Saskatchewan, dated 29th January, 1949. By cl. 16 of a contract, executed on 21st October, 1880, between the Canadian Government and the contractors (who were to constitute the Canadian Pacific Railway Co.), providing for the construction of the Canadian Pacific Railway, the contract being scheduled to and ratified by an Act of the Canadian Parliament of 1881 under which the Canadian Pacific Railway Co. was created, it was provided, *inter alia*, that the property of the respondent company used for the construction and working of the railway " shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any municipal corporation therein." In 1905, the Province of Saskatchewan, which was carved out of Rupert's Land and the North-west Territories, which had become part of Canada in 1868, was established by the Saskatchewan Act, 1905, of the Dominion Parliament, passed pursuant to the powers conferred by the British North America Act, 1871, which, by s. 2, empowered the Parliament of Canada when establishing new Provinces to make provision, *inter alia*, " for the passing of laws for peace, order, and good government of such Province." In purported compliance with its obligations under cl. 16 of the contract of 1880, the Dominion Parliament provided in s. 24 of the Saskatchewan Act of 1905 that " the powers hereby granted to the said Province shall be exercised subject to the provisions of s. 16 of the contract." The question having been raised whether the Canadian Pacific Railway Co. was, by virtue of cl. 16 of the contract and s. 24 of the Act of 1905, free from the " business tax " imposed by the City Act, 1947, of Saskatchewan—assessed at a rate per square foot of the floor space of each building used for the purposes of its business in the Province—it was contended by the Province, first, that the authority granted to the Dominion Parliament by s. 2 of the British North America Act, 1871, to make provision " for the passing of laws for the peace, order, and good government " of the Province was limited to the granting to the Province of the identical powers conferred on the original four Provinces of Canada by s. 92 (2) of the British North America Act, 1867—which provided that the Provincial Legislatures had exclusive power to make laws in relation to " direct taxation within the Province in order to the raising of a revenue for Provincial purposes "—and that no fetter on the power of taxation by Saskatchewan was permitted. It was contended, secondly, that the business tax was imposed on persons and companies carrying on a business, and not upon their property or upon their ownership or user of property.

VISCOUNT SIMON, giving the judgment, said that the first question was whether s. 24 of the Act of 1905 was validly enacted. The words " peace, order and good government " in s. 2 of the Act of 1871 were of very wide import, and a Legislature empowered to pass laws for such purposes had a very wide discretion. A Dominion Act constituting a new Province might depart from the strict 1867 pattern, and might prescribe what laws could be passed by the Province, and accordingly s. 24 of the Saskatchewan Act of 1905, imposing the limitation that the powers of the Province should be exercised subject to the provisions of cl. 16 of the contract of 1880, was validly enacted. Their lordships were not prepared to differ from the conclusion of the Supreme Court of Canada in *Reference re Section 17 of the Alberta Act* [1927] S.C.R. 364. Their lordships agreed with the view of the majority of the Supreme Court that in the present case the tax in question was imposed on the owner of things which he was using in his business. Where the measure of the tax was the extent of the taxpayer's property used in his business, and that property when so used was " forever free from taxation," the tax so measured could not be regarded as something lying outside the exemption. The exemption in cl. 16 accordingly operated to relieve the respondent company from the tax. Appeal dismissed.

APPEARANCES: *E. C. Leslie*, Q.C., *R. S. Meldrum*, Q.C., and *P. G. Makaroff* (all of the Canadian Bar) (*Lawrence Jones & Co.*); *C. F. H. Carson*, Q.C. (Canadian Bar), *Gahan*, Q.C., and *Allan Findlay* (Canadian Bar) (*Blake & Redden*); *Lord Hailsham*, Q.C., (*Lawrence Jones & Co.*) for the intervener the A.-G. for Manitoba; *E.C. Leslie*, Q.C. (*Lawrence Jones & Co.*) for the A.-G. for Alberta, intervener; *W. R. Jackett*, Q.C. (*Charles Russell & Co.*) for the intervener the A.-G. for Canada.

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[3 W.L.R. 409**

CEYLON: GIFT: UNDUE INFLUENCE

Antony *v.* Weerasekera

Lord Normand, Lord Cohen, Sir Lionel Leach and Mr. L. M. D. de Silva

8th July, 1953

This was an appeal from a judgment of the Supreme Court of Ceylon, dated 11th September, 1950, which had affirmed a judgment of the District Court of Colombo, dated 8th September, 1948.

The plaintiff, a widow of seventy years of age, instituted the action out of which this appeal arose, to obtain a declaration that a deed of gift of certain properties executed by her on 12th April, 1946, in favour of the first defendant, her granddaughter through a deceased daughter, was " void on the ground that it had been obtained . . . through the exercise of undue influence." The first defendant married the son of the second defendant on 28th June, 1947. The plaint alleged that the second defendant had begun to visit the plaintiff in 1945, and to evince concern and interest in her and the first defendant, and continued such behaviour as a self-constituted friend and adviser to the plaintiff. The case for the plaintiff was based on the alleged conduct of the second defendant in relation to her; and it was not disputed that if undue influence was shown to have been exercised on the plaintiff by the second defendant, it would vitiate the deed in favour of the first defendant, even though the latter took no part in the exercise of that undue influence. The two defendants denied the plaintiff's allegation. The District Judge dismissed the action after examining all the relevant aspects of the case, and the Supreme Court, without giving any reasons, because they were in full agreement with the findings of fact of the District Judge, affirmed his judgment.

Mr. L. M. D. DE SILVA, giving the judgment, said that their lordships took the view that the Supreme Court were clearly right in affirming the judgment below, but their lordships of the Board would have derived great assistance if the reasons for the dismissal had been stated. Their lordships agreed with the District Judge that the facts as found by him did not give rise in law to a case for setting aside the deed. The English law relating to undue influence was part of the law of Ceylon. It was so held by the Supreme Court of Ceylon in *Perera* v. *Tissera* (1933), 35 N.L.R. 257, pp. 266, 282, and their lordships were of the opinion that that view was correct. The principles on which this case fell to be decided were laid down by Cotton, L.J., in *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 171. That case was approved and applied in *Inche Noriah* v. *Shaik Allie Bin Omar* [1929] A.C. 127. It was also referred to in *Tufton* v. *Sperni* [1952] 2 T.L.R. 516, in which the Master of the Rolls made the observation, based on previous cases, of special relevance to this case, that certain circumstances could give rise to a relationship between two parties which made it " the duty of one party to take care of the other," and it was clear from what he said that the duty of taking care included the duty of giving advice. Counsel for the plaintiff had urged before the Board that the relationship between the plaintiff and the second defendant was in the circumstances of this case one of confidence giving rise to a duty on the part of the second defendant to surround the plaintiff with care and to advise her. He argued that there had been a breach of that duty and that consequently a presumption of undue influence had arisen. With that contention their lordships

were unable to agree. There was nothing in this case upon which the impugned deed could be assailed on the principles laid down in the authorities discussed. Appeal dismissed.

APPEARANCES: *Pritt*, Q.C., and *Stephen Chapman* (*Darley, Cumberland & Co.*); *Ralph Millner* and *T. O. Kellock* (*T. L. Wilson & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[1 W.L.R. 1007**

COURT OF APPEAL

RENT ACTS: DEATH OF STATUTORY TENANT: PROCEDURE WHERE RIVAL CLAIMANTS TO TENANCY

Taylor *v.* Willoughby

Evershed, M.R., Birkett and Romer, L.JJ.

26th June, 1953

Appeal from Warrington County Court.

After the death of the statutory tenant of a dwelling-house within the Rent Acts, two members of his family, a son and a step-daughter, both of whom had lived with the tenant for a considerable period immediately prior to his death, continued to live in the house, the son (the defendant Willoughby) paying to the step-daughter (the plaintiff Mrs. Taylor) £2 per week for board and other services. The landlord gave to the step-daughter a rent book and accepted rent from her. A dispute having arisen between the two occupants, Mrs. Taylor served a notice on the son requiring him to leave the premises by a specified date. He refused to go and she brought proceedings against him. The county court judge held that, there being a dispute as to which member of the statutory tenant's family was entitled to succeed to the tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*), the procedure to be followed was that laid down by the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, and that that procedure was mandatory. He accordingly dismissed the action and directed that proceedings should be brought under those rules. The step-daughter appealed.

EVERSHED, M.R., said that, as no application had been made under the rules, neither party could assert himself to be the statutory tenant. The procedure for determining disputes afforded by those rules was not mandatory and the direction that proceedings should be brought under them might not be effective. The better course was to stand the proceedings over and to give either party separately, or both together, liberty to apply under the rules. Then, if after a reasonable interval no application had been made, the plaintiff might wish to restore the action and seek to prove that a contractual tenancy had arisen by reason of the landlord's recognition of her as tenant.

BIRKETT and ROMER, L.JJ., agreed. Appeal allowed. No order as to costs.

APPEARANCES: *T. H. Pigot* (*Bentleys, Stokes & Lowless*, for *Steels*, Warrington); *A. Fletcher* (*Forshaw, Richmond & Co.*, Warrington).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 1020**

WRIT: GENERAL INDORSEMENT FOR DAMAGES FOR WITHDRAWAL OF SUPPORT COVERING CLAIM IN NEGLIGENCE

Graff Brothers Estates, Ltd. *v.* Rimrose Brook Joint Sewerage Board and Others

Singleton and Morris, L.JJ. 1st July, 1953

Interlocutory appeal from Barry, J.

The plaintiffs, owners and occupiers of land and houses, issued a writ against the defendants, a sewerage board assumed to be acting under statutory authority and a firm of contractors who carried out work on the board's instructions. The writ bore a general indorsement in regular form claiming damages for wrongfully taking away the support of the plaintiffs' land and houses. Later the statement of claim was delivered, but more than one year after the cause of action had accrued. By it the plaintiffs claimed damages for trespass, and alternatively, by para. 5, damages for negligence in failing to take proper precautions to prevent support being withdrawn from the land and buildings. The defendants, instead of delivering a defence, issued a summons asking that the paragraph alleging negligence be struck out on the ground that it set up a new cause of action not indorsed on the writ, and that such new cause of action was barred, at the time when the statement of claim was delivered, by s. 21 of the Limitation Act, 1939. The district registrar made the order in the terms asked for, and the judge in chambers upheld it. The plaintiffs appealed.

SINGLETON, L.J., said that, if para. 5 set up a new cause of action, it appeared from the dates which the court had been given that the cause of action was barred by s. 21 of the Limitation Act, 1939. The real question, therefore, was whether or not the indorsement on the writ was sufficiently wide to embrace para. 5. It was precisely in the form set out in the "Annual Practice" under "support," and appeared to him (his lordship) to be regular within R.S.C., Ord. 2, r. 1, and Ord. 3, r. 2. The forms in the "Annual Practice" for indorsements for negligence, trespass to land, support, and nuisance, gave substance to the submission that, where a plaintiff was deprived of support to his land, there might be a claim for damages under any of those four heads, and in his view para. 5 ought not to be regarded as setting up a new cause of action. By their writ the plaintiffs had stated the nature of their complaint, and in the statement of claim they set out in different ways the nature of the remedy or remedies they sought, having regard to the facts pleaded. He (his lordship) did not think that by so doing they caused any embarrassment to the defendants. The appeal should be allowed.

MORRIS, L.J., agreed. He said that the position was entirely different from that in *Marshall* v. *London Passenger Transport Board* [1936] 3 All E.R. 83, for para. 5 did not embark on any "quite different set of ideas" or "on quite a different allegation of fact." It might be regarded as a new explanation or a new allegation as to how the wrongful taking away of support may have come about, but it was the same complaint as was denoted by the indorsement on the writ.

APPEARANCES: *R. F. Levy*, Q.C., and *E. D. Sutcliffe* (*J. Tickle and Co.*, for *Owen, Dawson & Wynn-Evans*, Liverpool); *Lord Hailsham*, Q.C., and *B. L. A. O'Malley* (*Berrymans*, for *Barrell and Co.*, Liverpool).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[3 W.L.R. 419**

FAMILY PROVISION: NOTHING FOR CHILDREN OF FIRST MARRIAGE: WHETHER UNREASONABLE

***In re* Howell; Howell *v.* Lloyds Bank, Ltd.**

Evershed, M.R., Birkett and Romer, L.JJ. 1st July, 1953

Appeal from Roxburgh, J.

A testator had divorced his first wife in 1947, the custody of the two young children of the marriage being given to him. He remarried, and the children of his first marriage lived with him, his second wife and the child of his second marriage. By his will the testator appointed his second wife to be guardian of his children and left all his property to her. He died in 1950, leaving an estate of approximately £2,500, which included the house where he had lived with his family. After the testator's death his widow became seriously ill and was, thereafter, incapable of earning her living. The children of the testator's first marriage went to live with their mother, and on an application made to Danckwerts, J., to make them wards of court, he allowed them to remain with their mother. The children applied by their next friend under the Inheritance (Family Provision) Act, 1938, that reasonable provision might be made for them out of the testator's estate. At the time when the application came before Roxburgh, J., both the children's mother and the testator's widow were in receipt of national assistance. Roxburgh, J., dismissed the application.

EVERSHED, M.R., referred to *In re Styler* [1942] Ch. 387, and said that the reasonableness of the provision made by a testator for a dependant should be judged for the purposes of the Inheritance (Family Provision) Act, 1938, by reference to the circumstances which presented, or should have presented, themselves to the testator at the moment of his death, including eventualities which were reasonably foreseeable. The provision should not be judged exclusively in the light of the circumstances after the testator's death. On that basis it was not possible to say that the direction of the testator that, if his widow survived, she should have his whole estate, was unreasonable or unwarranted. The application should be dismissed.

BIRKETT, L.J., agreed.

ROMER, L.J., agreed, adding that, since the questions arising under the Act of 1938 were very much matters for the judge's discretion, the Court of Appeal would not readily interfere with orders made under the Act. Appeal dismissed.

APPEARANCES: *J. Mills* (*Pengelly & Co.*); *A. C. Munro Kerr* (*Joynson-Hicks & Co.*, for *Lyndhurst G. Groves*, Portsmouth).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 1034**

ADVANCEMENTS TO CHILDREN: ADMISSIBILITY OF EVIDENCE AS TO INTENTION

***In re* Shephard; Shephard and Another *v.* Cartwright and Another**

Evershed, M.R., Denning and Romer, L.JJ.

1st July, 1953

Appeal from Harman, J. ([1953] 1 W.L.R 460; *ante*, p. 151.)

In 1929 P. E. Shephard, with an associate, promoted a number of small companies and caused the shares to which he was entitled to be allotted in varying proportions to his three children, one of whom was then an infant. There was no evidence as to the circumstances in which these allotments were made. The companies were very successful and in 1934 P. E. Shephard and his associate promoted a public company which acquired the shares of all the private companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares. P. E. Shephard never informed his three children of this sale. On the formation of the public company they signed, without knowing what they were doing, the necessary documents to enable their father to sell their shares in the private companies and receive the consideration, which he did, paying the cash consideration into his own account. Shortly afterwards he caused such moneys to be divided roughly in proportion to their interest in the private companies and paid into three deposit accounts standing in the names of his three children. Subsequently, P. E. Shephard procured from the children mandates authorising the bank to honour his signature for withdrawals from these accounts. In signing these mandates the children did not know what they were doing. P. E. Shephard subsequently withdrew the whole of the sums from the deposit accounts and used them for his own purposes. In 1935 he promoted an estate company and caused the children to be entered in the company's books as creditors on loan account for large sums. He also effected a number of other transactions resulting in shares or interests in various companies and businesses being vested in one or other of his children. He also from time to time purchased house property in the names of his children, of which the children were aware. In 1949 P. E. Shephard died, having by his will, after making certain legacies, left his residuary estate to his three children. They then learnt of the original allotment of shares to them and of the subsequent dealings with the proceeds of sale. In these proceedings two of the children claimed as creditors against the executors, H. S. Dunk and J. O. Cartwright, the balance of the moneys representing the proceeds of sale of the shares allotted to them in 1929, on the footing that the allotments were advancements, and accounts. Their claim would have entirely exhausted the estate, which for probate purposes was sworn at £94,000 gross. It was opposed by the third child. Harman, J., dismissed the action.

EVERSHED, M.R., said that if the allotments made in 1929 were absolute gifts to the children so that, thereafter, the father was a trustee of the moneys which came into his hands, the Limitation Act, 1939, would not defeat the children's claim and, in any case, time would not run against them until they discovered their right of action. The onus was, however, on them to establish the making of absolute and unqualified gifts by the father, and on the evidence they failed for, though the transactions of 1929 amounted to advancements to the children, they were of a qualified character, leaving the father a power of control and, if necessary, of revocation—a dominion over the subject-matter advanced, as in *Devoy* v. *Devoy* (1857), 3 Sm. & G. 403. The father's estate was not, therefore, accountable for the sums withdrawn from the relevant deposit accounts.

DENNING, L.J., said that, if there was initially an advancement, the plaintiff children would have had a good cause of action, but the father never intended to make a gift to them at all; it was a monstrous claim. In considering whether the testator had intended to make an absolute gift to the children evidence was admissible not only of his contemporaneous statements, which were part of the transaction, but also of any subsequent acts and conduct on his part which threw light on his intention.

ROMER, L.J., agreed; no immediate absolute gift was intended in 1929. Evidence as to intention to transfer property to a child was admissible if within the following categories: First, evidence of acts both by the father and child if against interest, for such acts operated as admissions; secondly, acts so associated with the original transaction as, in effect, to form part of it (for example, the continued retention by the father, upon an uncommunicated purchase of property in his child's name, of the title deeds and of accrued and accruing rents subsequently paid by tenants); thirdly, acts tending to show a course of dealing as between parent and child. Appeal dismissed.

APPEARANCES: *B. L. Bathurst*, Q.C., and *Victor Coen* (*Douglas and Co.*); *Arthur de W. Mulligan* (*MacDonnell*); *Sir Lynn Ungoed-Thomas*, Q.C., and *F. B. Alcock* (*Sidney Pearlman*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[3 W.L.R. 378**

SHIPPING: TOWAGE: COLLISION: INDEMNITY CLAUSE IN CONTRACT

Swan Hunter and Wigham Richardson, Ltd. *v.* France Fenwick Tyne & Wear Co., Ltd.; The "Albion"

Somervell, Jenkins and Hodson, L.JJ. 2nd July, 1953

Appeal from Willmer, J.

By a contract in writing dated 3rd August, 1949, the plaintiffs, France Fenwick Tyne & Wear Co., Ltd. (towage contractors), agreed with the defendants, Swan Hunter & Wigham Richardson, Ltd. (shipbuilders), to tow the uncompleted aircraft carrier *Albion* from the Tyne to Rosyth, using three tugs for the purpose. The *Albion* was a mere hulk without steering apparatus, motive power or equipment of any sort, and the plaintiffs agreed to provide her, *inter alia*, with side-lights and other navigational lights. It was a term of the agreement that the printed towage conditions of the plaintiffs were to be incorporated in the contract. Those conditions contained the following indemnity clause: "That to all intents and purposes whatsoever the master and crew of the tug or tugs employed shall be deemed and considered to be the servants of the owners, master and crews of the vessels or crafts towed the tug owners being in no way liable for any of their acts or for any of the consequences thereof. That the owners of the tugs are not held liable for any loss or damage whatsoever which may happen to or be occasioned by any vessel . . . during any towage contract whether arising from or occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of them or their servants . . . or from any perils of the seas, rivers or navigation . . . nor for any of the consequences of the causes above excepted. The owners or persons interested in the vessel or craft being so towed . . . shall and do undertake to bear, satisfy and indemnify the tug owners against all liability for the aforegoing matters." During the towage the *Albion* collided with and sank the steamship *Maystone*, and in the action which arose from the collision the *Albion* was held alone to blame, the liability being apportioned as to two-thirds against Swan Hunter and one-third against France Fenwick in respect of their negligence in providing a defective port side-light and for towing the *Albion* to sea equipped with that light. In third-party proceedings France Fenwick claimed against Swan Hunter an indemnity under the towage conditions.

SOMERVELL, L.J., reading the judgment of the court, said that the plaintiffs were not, because they were in breach of their contract, precluded from relying on the indemnity clause, since they had not committed a breach of a fundamental condition which went to the root of the contract. In the circumstances the plaintiffs were entitled to an indemnity under the clause; the final words, "all liability for the aforegoing matters," were sufficient to include liability to a third party arising out of or occasioned by negligence or default which also constituted a breach of contract as between the plaintiffs and the defendants. Appeal allowed: cross-appeal dismissed.

APPEARANCES: *K. S. Carpmael*, Q.C., and *G. N. W. Boyes* (*Middleton, Lewis & Co.*, for *Middleton & Co.*, Sunderland); *H. I. Nelson*, Q.C., and *Derek H. Hene* (*Bentleys, Stokes & Lowless*, for *Wm. Mark Pybus & Sons*, Newcastle-upon-Tyne).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 1026**

COSTS: DIVORCE: ORDER FOR COSTS AGAINST SUCCESSFUL LEGALLY AIDED CO-RESPONDENT IMPROPER

Howell *v.* Howell

Somervell, Jenkins and Hodson, L.JJ.

6th July, 1953

Appeal from Mr. Commissioner Bush James, Q.C.

A wife petitioned for divorce on the ground of cruelty. The husband respondent, who was legally aided, denied cruelty and

cross-petitioned, alleging adultery by the wife with a man cited as co-respondent, The co-respondent was a lodger in the matrimonial home. He became friendly with the wife and they admittedly went about together, but misconduct was denied by both. The commissioner dismissed both the petition and the cross-petition. He said, however, that in his view the conduct of the party cited was to be much deprecated, adding: "I think it is entirely through him that the wife left her husband in August, 1951. I think he comes out of this case very badly; but that is very different from making a finding of adultery against him." The commissioner then made an order against the successful co-respondent, who was also legally aided, for £75 costs. He said he had an absolute discretion in regard to costs, and added: "Why should the taxpayer subsidise this man?" The co-respondent appealed. The other parties did not appear, and were not represented.

SOMERVELL, L.J., said that the commissioner had made the order after ascertaining that the appellant had to make a substantial contribution to his own costs. It was submitted that there was no jurisdiction to order a successful defendant, or co-respondent, to pay his own costs (see *Gray* v. *Ashburton (Lord)* [1917] A.C. 26 and *Foster* v. *G.W.R. Co.* (1882), 8 Q.B.D. 515). It was not necessary to decide that, as it was also submitted, and rightly, that such an order could only be made in the most exceptional circumstances, and that the circumstances of the case did not justify the commissioner's order, which was based on the consideration that the taxpayer should not subsidise the appellant, as he would, because the husband was also legally aided. The Legal Aid and Advice Act, 1949, provided, by s. 1 (7) (*b*): "the rights conferred . . . on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court . . . is normally exercised." It would not be right to exercise this discretion, assuming that it existed, so as to relieve the taxpayer *quoad* the person in whose favour the order for costs was made.

JENKINS and HODSON, L.JJ., agreed. Appeal allowed. No order as to costs.

APPEARANCES: *R. T. Barnard* (*Blundell, Baker & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1024**

QUEEN'S BENCH DIVISION

SHIPPING: DECK CARGO: CLAUSE EXEMPTING CARRIER FROM RESPONSIBILITY FOR LOSS

Svenska Traktor Aktiebolaget *v.* Maritime Agencies (Southampton), Ltd.

Pilcher, J. 11th June, 1953

Action.

The plaintiffs were the consignees named in a bill of lading incorporating the Carriage of Goods by Sea Act, 1924, covering a number of tractors loaded on the defendants' ship for carriage from Southampton to Stockholm. The ship left port with a number of the tractors stowed on the hatches, one of which was lost overboard owing to heavy weather. The plaintiffs claimed damages for breach of contract and/or duty in or about the carriage of their goods by sea and alleged that it was the duty of the defendants under the bill of lading and/or under the Carriage of Goods by Sea Act, 1924, and/or as carriers for reward properly and carefully to stow, carry, keep, care for and discharge all the tractors and their equipment. The defendants denied that any duty rested upon them as was alleged, denied any negligence on their part, and relied upon a clause in the bill of lading: "Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom" to escape liability for any loss to the plaintiffs; alternatively, they relied on the defence "perils or accident of the sea" under art. IV (2) of the Schedule to the Act. By art. I (*c*) of the Schedule to the Act: "'Goods' includes goods, wares, merchandises, and articles of any kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." Article III provides, by r. 2: "Subject to the provisions of art. IV, the carrier shall properly and carefully load . . . and discharge the goods carried"; by r. 8: "Any clause . . . in a contract of carriage relieving the carrier . . . from liability for loss or damage to . . . goods . . . arising from negligence, fault or failure in the duties and obligations provided in this article . . . shall be null and void . . ."

PILCHER, J., said that the defendants contended that, while there was no specific statement in the bill of lading that any tractors were being carried on deck, the clause giving liberty so to carry them amounted to an agreement that the ship was entitled so to carry them, so as to exclude the tractor in question from the definition of "goods" in art. I (*c*). That contention was quite untenable. The intention of the Act was to allow the carrier to carry deck cargo free from the obligations of the Act, provided that the bill of lading stated that the particular cargo was being so carried. Such a statement served as a warning to consignees and indorsees, when accepting the documents, that the goods were on deck and not subject to the Act. A mere general liberty to carry goods on deck was not a statement in the contract of carriage that they were in fact being so carried. Accordingly, the tractors were "goods" and subject to the obligation of art. III, r. 2. That being so, the carrier was not entitled to carry them on deck free of obligation, as the second part of the clause offended against art. III, r. 8, *W. R. Varnish & Co., Ltd.* v. *"Kheti" (Owners)* (1949), 82 Ll. L. Rep. 525, notwithstanding. The tractor had been lost overboard, in the kind of weather that could be expected, owing to lack of care, and the consignees were entitled to succeed. Judgment for the plaintiffs.

APPEARANCES: *M. Kerr* (*Ince, Roscoe, Wilson & Griggs*); *H. V. Brandon* (*Holman, Fenwick & Willan*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 426**

PROBATE, DIVORCE AND ADMIRALTY DIVISION

HUSBAND AND WIFE: PERIODICAL PAYMENTS: NEGLECT TO MAINTAIN: DECREE OF JUDICIAL SEPARATION

King *v.* King

Davies, J. 5th July, 1953

Summons (adjourned into court).

On 3rd September, 1952, the wife presented a petition for a judicial separation on the ground of the husband's adultery, and a decree was pronounced on 28th January, 1953. The House of Lords had dismissed, on 31st July, 1952 ([1953] A.C. 124), the husband's appeal from the decision of the Court of Appeal ([1951] W.N. 545), reversing a decision of Barnard, J., who had granted a decree *nisi* of divorce on the ground of the wife's alleged cruelty, exercising his discretion in respect of the husband's adultery. The wife made no application for permanent alimony under s. 20 (2) of the Matrimonial Causes Act, 1950, after the decree of judicial separation; but on 7th May, 1953, she took out an originating summons under s. 23 of that Act and alleged that the husband had been guilty of wilful neglect to provide her with reasonable maintenance. It was admitted on her behalf that she had chosen to apply under s. 23, rather than under s. 20 (2), because the court had power to order that periodical payments should be secured under s. 23 but had no such power to order security under s. 20. The husband at first entered a general appearance to the originating summons; but on 5th June, 1953, he applied by the present summons for leave to amend his appearance by adding the words, "under protest, the respondent disputing that the court has jurisdiction to entertain the application," and for directions as to the determination of the question arising by reason of such an appearance. This summons was adjourned by the registrar to the judge, and was heard in chambers on 24th June, 1953, when it was adjourned into open court for judgment.

DAVIES, J., reading his judgment, said that the important words of the section in connection with the present summons were that "the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation," might order the husband to make periodical payments. It had been contended on behalf of the husband that once a decree of judicial separation had been pronounced, the court would have no further jurisdiction under s. 23. His lordship referred to *Rusby* v. *Rusby* [1950] W.N. 349, *Woodward* v. *Woodward* [1952] P. 299, 300–301, and to an observation by Lord Merriman, P., in *Cooper* v. *Cooper* [1953] P. 26, 34, in which the Divisional Court had held that a wife who had obtained a decree of judicial separation was entitled to apply for an order in a court of summary jurisdiction on the ground of wilful neglect to maintain. His lordship said that although he did not find the point easy to decide, he felt that it was covered by Willmer, J.'s decision in *Woodward* v. *Woodward*, *supra*. In that case the preliminary point had been taken that,

as the wife had alleged desertion for less than three years, the court would not have jurisdiction to entertain proceedings for judicial separation and that the court therefore had no jurisdiction to entertain an application under s. 23. Willmer, J., had held that the contention was fallacious, because it confused the question whether there was jurisdiction to entertain proceedings with the question whether there were in fact good grounds for proceedings. There was no essential difference between such a case and one in which a wife petitioned for judicial separation when by reason of the existence of a previous decree she could not hope in the event to be successful. In both cases the court could entertain the petition, though in neither would a decree be pronounced. The wife was accordingly entitled to proceed with her application under s. 23. Summons dismissed. Leave to appeal.

APPEARANCES: *D. Armstead Fairweather (Scadding & Bodkin)*; *Colin Duncan* and *H. R. La T. Corrie (Bird & Bird)*.

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[3 W.L.R. 433**

COURT OF CRIMINAL APPEAL

COMMITTAL TO QUARTER SESSIONS: QUASHING COMMITTAL: SENTENCE: OFFENCES NOT TO BE TAKEN INTO ACCOUNT

R. *v.* Simons and Simons

Lord Goddard, C.J., Parker and Donovan, JJ. 6th July, 1953

Applications for leave to appeal against sentence.

One of the applicants was charged before justices under s. 7 (4) of the Road Traffic Act, 1930, with driving a motor vehicle while disqualified and was committed to quarter sessions for trial for that and other offences. A doubt arose as to whether he had elected to go for trial for the offence of driving while disqualified, and a count charging that offence was not included in the indictment. The recorder quashed the committal for that offence and the applicant pleaded guilty to the other offences. In passing sentence for the other offences, the recorder took into consideration the offence of driving while disqualified. The applicant applied for leave to appeal against his sentence of three years' corrective training.

LORD GODDARD, C.J., said that it would have been better, in the circumstances, to have included the count of dangerous driving in the indictment; evidence could then have been given, by calling the magistrates' clerk, as to whether the applicant had elected to go for trial or not, and if the recorder came to the conclusion that he had not, he could have quashed the count. That was the first thing about which the court thought that a mistake was made. He did not think that a court could quash a committal; the only thing that it could do in such circumstances was to see that the indictment contained a count for the offence and then quash the count. There were two objections to taking into consideration the offence of dangerous driving. First, as the court had always said, if a court had no power to try an offence they could not take it into consideration when passing sentence for another offence; quarter sessions only had power to try the offence if the applicant had elected to go for trial. The second objection was that offences in relation to the driving of motor cars were not offences which ought to be taken into account where there is a conviction for some other offence; the special provisions of the Road Traffic Act, 1930, with regard to endorsement or disqualification from holding a licence could only follow on a conviction and, as had been pointed out over and over again, the taking into consideration of an offence did not in law amount to a conviction. This court, therefore, wished to repeat once more, first, that if a court had no jurisdiction to try a particular offence, it ought not to take that offence into account when passing sentence for an offence which it had power to try and, secondly, that offences against the Road Traffic Act in relation to the driving, insurance or otherwise of motor vehicles ought not to be taken into account when passing sentence for another offence, but should be left for separate prosecution. In the present case, however, there was no ground for interfering with the sentence. Applications refused.

The applicants were not represented.

[Reported by Miss J. F. LAMB, Barrister at-Law] **[1 W.L.R. 1014**

SURVEY OF THE WEEK

ROYAL ASSENT

The following Bills received the Royal Assent on 14th July:—

Accommodation Agencies
Army and Air Force (Annual)
Births and Deaths Registration
Bradford Corporation (Trolley Vehicles) Order Confirmation
British Transport Commission Order Confirmation
Clyde Navigation Order Confirmation
Dogs (Protection of Livestock)
Dover Harbour
Education (Miscellaneous Provisions)
Gateshead Extension
Great Ouse River Board (Revival of Powers, &c.)
Hospital of St. Mary Magdalen (Colchester) Charity Scheme Confirmation
Hospital of the Blessed Trinity (Guildford) Charity Scheme Confirmation
Huddersfield Corporation
Land Drainage (Surrey County Council (Rive Ditch Improvement)) Provisional Order Confirmation
Local Government (Miscellaneous Provisions)
Local Government Superannuation
London County Council (Money)
Metropolitan Water Board
National Insurance
Navy and Marines (Wills)
Newport Corporation
Rhodesia and Nyasaland Federation
Road Transport Lighting
Road Transport Lighting (No. 2)
Runcorn-Widnes Bridge
Saint Oswald Estate
Slaughter of Animals (Pigs)
Therapeutic Substances (Prevention of Misuse)
Tynemouth Corporation
Walsall Corporation (Trolley Vehicles) Order Confirmation
Warkworth Harbour

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—
Coventry Cathedral Bill [H.C.] [13th July.
Finance Bill [H.C.] [14th July.

Read Second Time:—
Marshall Aid Commemoration Bill [H.C.] [16th July.
National Insurance (Industrial Injuries) (No. 2) Bill [H.C.] [16th July.
New Towns Bill [H.C.] [14th July.
Valuation for Rating Bill [H.C.] [14th July.

Read Third Time:—
Enemy Property Bill [H.L.] [13th July.

In Committee:—
Auxiliary Forces Bill [H.L.] [14th July.
Licensing Bill [H.L.] [14th July.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Third Time:—
Dudley Extension Bill [H.L.] [16th July.
Foundling Hospital Bill [H.L.] [16th July.
Hospital Endowments (Scotland) Bill [H.L.] [13th July.
Isle of Man (Customs) Bill [H.C.] [17th July.
Monopolies and Restrictive Practices Commission Bill [H.C.] [17th July.
Post Office Bill [H.L.] [17th July.
Registration Service Bill [H.L.] [17th July.
University of St. Andrews Bill [H.L.] [13th July.

B. QUESTIONS

COUNTY COURTS INVESTMENT ACCOUNTS (INTEREST)

Asked why money paid into the county court by way of damages, etc., bore interest at a lower rate than that paid into

the High Court, and whether he would take steps to end this differentiation, the ATTORNEY-GENERAL said there were good grounds for the differentiation, but the Lord Chancellor, with the concurrence of the Treasury, proposed to reintroduce in the county court an investment account in which suitors' money, if placed there by order of the court, would bear interest at 3 per cent. He could not hold out much hope that this would apply to moneys already in court. [13th July.

PRISONERS (PRESS ARTICLES)

The ATTORNEY-GENERAL stated that the question of the publication by newspapers of articles written by persons charged with murder was being looked into, with particular reference to the provision of funds for the defence of the person charged. [13th July.

PUBLIC SERVICE VEHICLES (LICENSING)

Mr. LENNOX-BOYD stated that the Theatres National Committee had submitted two papers to the Thesiger Committee. It was for the Committee to decide whether they should be invited to give oral evidence of their views on the problem created by the recent judgment in *Wurzal* v. *Dowker* (*ante*, p. 390). [13th July.

UNLIGHTED VEHICLES (PROSECUTIONS)

Sir DAVID MAXWELL FYFE, asked whether he would urge the police to exercise restraint in prosecuting persons for parking cars without lights, said it was neither his business nor his desire to influence the police in the matter of prosecutions. They were free, subject to the assistance of the Director of Public Prosecutions, to bring such cases as they liked. [16th July.

CRIMINAL TRIAL PROCEDURE (INSANITY)

The HOME SECRETARY, when asked whether he would now implement the recommendations of the Committee presided over by the late Lord Atkin, which considered the law, practice and procedure relating to criminal trials in which the plea of insanity was raised as a defence, said he proposed to await the report of the Royal Commission on Capital Punishment, which, he understood, had also considered these matters. [16th July.

CRIMINAL CASES (TRANSCRIPTS OF EVIDENCE)

The HOME SECRETARY stated that the persons to whom copies of the transcript of the proceedings at the trial of any person on indictment might be supplied were prescribed by s. 16 of the Criminal Appeal Act, 1907, and r. 5 of the Criminal Appeal Rules, 1908. They were the registrar, for the use of the Court of Criminal Appeal or any judge thereof; any interested person (which expression was narrowly defined); and the Secretary of State for his use. [16th July.

STATUTORY INSTRUMENTS

Ayrshire River Purification Board (Area and Establishment) Order, 1953. (S.I. 1953 No. 1072 (S. 89).) 6d.
Draft **British Transport Commission** (Compensation to Employees) Regulations, 1953. 8d.
Coal Industry Nationalisation (Interim Income) (Rates of Interest) (No. 2) Order, 1953. (S.I. 1953 No. 1073.)
Coffin Furniture and Cerement-Making Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1953. (S.I. 1953 No. 1077.) 5d.
Commonwealth Telegraph Act, 1949, Amendment Regulations, 1953. (S.I. 1953 No. 1079.)
Education Accounts (Exemption from Use of Prescribed Form) (Scotland) Order, 1953. (S.I. 1953 No. 1063 (S. 88).)
Exchange of Securities (No. 2) Rules, 1953. (S.I. 1953 No. 1060.) 5d.
Family Allowances (Qualifications) Amendment Regulations, 1953. (S.I. 1953 No. 1059.) 6d.
Draft **Federation of Rhodesia and Nyasaland** (Constitution) Order in Council, 1953. 1s. 11d.
Government Stock (Amendment) Regulations, 1953. (S.I. 1953 No. 1062.)
Hartlepool Corporation Act, 1925, Modification Order, 1953. (S.I. 1953 No. 1071.)
Local Government (Dissolution of Small Burgh: Polling Procedure) (Scotland) Regulations, 1953. (S.I. 1953 No. 1057 (S. 86).) 5d.
Local Government (Formation of New Burgh: Polling Procedure) (Scotland) Regulations, 1953. (S.I. 1953 No. 1058 (S. 87).) 5d.
London Traffic (Prescribed Routes) (No. 20) Regulations, 1953. (S.I. 1953 No. 1065.)
London Traffic (Restriction of Waiting) (Egham) Regulations, 1953. (S.I. 1953 No. 1066.)
Marriages Validity (St. John's Methodist Church, Outwood) Order, 1953. (S.I. 1953 No. 1070.)
Miscellaneous Controls (Revocation) Order, 1953. (S.I. 1953 No. 1078.)
Stopping up of Highways (Essex) (No. 2) Order, 1953. (S.I. 1953 No. 1064.)

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Administration of Assets—ULTIMATE INCIDENCE OF ESTATE DUTY AMONG BENEFICIARIES

Q. A testatrix, by her will, bequeathed her "personal chattels" (free of duty) to *X* and devised her freehold house to him absolutely, directing that all duties thereon be paid as part of her testamentary expenses out of her general personal estate. She also bequesthed (free of duty) several pecuniary legacies and (free of duty) a specific legacy of shares of a private company. The residue (subject to the payment of her funeral and testamentary expenses, death duties, debts and legacies stated to be thereby charged primarily on her personal estate) she devised and bequeathed to *X* absolutely. The estate is solvent, but the residue is insufficient to pay the estate duty. As between the beneficiaries, please state how the various interests created by the will should abate?

A. The estate duty on personalty is a testamentary expense (*Re Owers* [1941] Ch. 17), and the estate duty on the freehold house is by the will expressly declared to be a testamentary expense. Accordingly, all the duty will be payable in the same manner. Applying the order of administration prescribed by Pt. II of the First Schedule to the Administration of Estates Act, 1925, the first fund to be applied in payment of the duty after the residuary estate has been exhausted will be that set aside to meet the pecuniary legacies which will abate rateably. If that fund is insufficient, the personal chattels, the freehold house and the specific legacy of shares will be charged with the duty rateably according to value, but only after the whole of the pecuniary legacies have been exhausted.

Income Tax—DEDUCTION BY TRUSTEE FROM WEEKLY PAYMENTS WHERE RECIPIENTS NOT LIABLE TO TAX

Q. *A* devised his residuary estate to *B*, who is the sole executor, subject to *B* making payments of £2 10s. a week and 10s. a month to *C* and *D* respectively during their lives. The will provides that *C* and *D* shall pay their own income tax thereon. Must *B* deduct tax at the standard rate when making the payments to *C* and *D*? *C* and *D* are unlikely to be liable for tax owing to the amount of their income.

A. The provisions of the Income Tax Act, 1952, ss. 169, 170 and 506 (2) are mandatory despite the fact that the trustee well knows that the recipient will claim repayment of the tax which has been deducted. However, where this is the case, an approach should be made to H.M. Inspector of Taxes through whom the recipients (*C* and *D*) would apply for repayment, setting forth their circumstances and income. Where the Inspector is satisfied that they are not liable to pay tax he will usually be happy to issue a certificate authorising the trustee to pay over the amounts in full, as he will thereby be saved the trouble of making the repayments.

Estate Duty—Joint Tenancy of Husband and Wife

Q. If a husband puts property in the names of himself and his wife as joint tenants and a period of five years elapses before the husband dies, is the wife responsible for estate duty on the whole of the property or otherwise? Obviously an interest passes to the wife on death in such a case as the above, but just as obviously it is not an interest of the whole because the wife has a similar interest.

A. If a husband puts property in the joint names of himself and his wife there is a presumption of advancement and there will be a beneficial joint tenancy (*Dunbar* v. *Dunbar* [1909] 2 Ch. 639). Whether the husband survives for five years or not, duty is *prima facie* payable on *the whole* under the Finance Act, 1894, s. 2 (1) (*c*). By concession, however, the Crown will accept duty on half the property if it can be shown that the wife in fact enjoyed one-half of the income for at least five years. In the case of a matrimonial home the wife is considered to have enjoyed one-half. In the case of realty not the matrimonial home there is a presumption that the wife was entitled to enjoy one-half (see *Dunbar* v. *Dunbar, supra*), so that the concession will operate unless it be the fact that she did not enjoy that half for her own use. In the case of personalty investments the presumption of advancement only applies to capital on death of the advancor and not to the intermediate income (see *Re Eykyn's Trusts* (1877), 6 Ch. D. 115; *Re Hood* [1923] 1 Ir. R. 109). Hence for the concession to operate it must be affirmatively shown that the wife enjoyed the income as of right, i.e., that there was an intention to make a gift of it to her and that that intention was carried out.

NOTES AND NEWS

Honours and Appointments

The Secretary of State for the Colonies announces that the Queen has been pleased to approve the appointment of Mr. K. S. Stoby, Registrar of Deeds and of the Supreme Court, British Guiana, to be Third Puisne Judge, British Guiana.

Mr. Edward Addison Doughty, solicitor, of Arundel Street, Strand, W.C.2, has been appointed a Director of the Legal & General Assurance Society, Ltd. He relinquishes his seat on the Metropolitan Board of the Society.

Mr. David Laurence Morgan, solicitor, of Tunbridge Wells, has been appointed deputy to the Tonbridge District Coroner. He succeeds Mr. Douglas S. Thomson, who recently resigned.

The Lord Chancellor has appointed Mr. Joseph Edgar Wilfred Booth to be an Assistant Registrar of County Courts as from 20th July, 1953. He will be attached to the Manchester County Court.

The following appointments are announced in the Colonial Legal Service: Mr. W. H. Hurley, Chief Registrar, Supreme Court, Nigeria, to be Puisne Judge, Nigeria; Mr. A. R. Cools-Lartigue, Puisne Judge, Windward and Leeward Islands, to be Puisne Judge, Jamaica; Mr. C. R. Stuart, Magistrate, Uganda, to be Puisne Judge, Nigeria; Mr. S. P. J. Q. Thomas, Chief Magistrate, Nigeria, to be Puisne Judge, Nigeria; Mr. P. J. Mooney to be Crown Counsel, Sarawak; Mr. D. N. E. Rea to be Crown Counsel, Hong Kong; and Mr. A. C. B. Reid to be Crown Counsel, Kenya.

Personal Notes

After forty years' service to the United Kingdom Pilots' Association, Sir John Hampden Inskip, K.B.E., B.A., solicitor, of Bristol, has vacated the office of secretary and solicitor.

Miscellaneous

At The Law Society's Intermediate Examination, held on 18th and 19th June, 1953, six candidates gave notice for the whole examination, of whom two passed the law portion only. Of 246 candidates who gave notice for the law portion only, 165 passed, of whom P. W. Battle, J. Chalklen, Miss E. D. Dando, S. Ford, S. F. Gambrill, B. A. Greenwood, F. N. F. Haddock, A. D. G. Hill and J. V. Moore were placed in the first class. Of 297 candidates who gave notice for the trust accounts and book-keeping portion only, 182 passed.

In a match by foursomes at Worplesdon on 10th July between Lloyd's Golf Club and the London Solicitors' Golf Society, Lloyd's won by 6–2.

INCOME TAX: WEAR AND TEAR ALLOWANCES

A reprint of the list of percentage rates was published on 17th July by H.M. Stationery Office, price 9d.

Wills and Bequests

Mr. T. I. Clough, solicitor, of Bradford, left £14,276 (£14,102 net).

Mr. Francis Corell, retired solicitor, formerly of Arundel Street, Strand, left £25,080.

Colonel William Garner, C.M.G., T.D., D.L., retired solicitor, formerly of Hounslow, left £53,128 (£51,507 net).

Miss Annie Maude Mary Williams, of Monmouth, left £8,695. She left £1,000 to The Law Society, to be applied to the Society's rebuilding fund, and after other bequests left the residue of her property to the Solicitors' Benevolent Association, in accordance with the wish of her late brother, Mr. Alfred Williams, solicitor.

OBITUARY

MR. L. C. BURCHER

Mr. Leslie Corbett Burcher, solicitor, of Bristol, died recently, aged 57. He was admitted in 1919.

COL. SIR GERALD BRUCE

Colonel Sir Gerald Trevor Bruce, K.C.B., C.M.G., D.S.O., T.D., solicitor, of Pontypridd, Senior Regional Commissioner for Wales from 1940 to 1945 and Lord Lieutenant of Glamorganshire from 1943 until last year, died on 7th July, aged 81. He was a former president of the Pontypridd and Rhondda Law Society. His firm handled most of the legal affairs of the former South Wales Miners' Federation. He was Chairman of the Wales and Monmouthshire Industrial Estates, Ltd., and of the South Wales and Monmouthshire Industries Association. He was admitted in 1893 and was knighted for public services in 1941.

MR. R. LARGE

Mr. Robert Large, retired solicitor, formerly of Surrey Street, London, W.C.2, died recently, aged 84. He was admitted in 1893.

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